

Letter of Findings Number: 04-20130102
Sales Tax
For Tax Years 2009-2011

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ISSUES

I. Sales Tax—Boat Sales.

Authority: IC § 6-8.1-5-1; IC § 6-2.5-2-1; IC § 6-2.5-1-2; IC § 6-2.5-4-1; IC § 6-2.5-9-3; Sales Tax Information Bulletin 28WC (August 2008).

Taxpayer protests the imposition of sales tax on specific transactions.

II. Sales Tax—"Like-Kind Exchange."

Authority: IC § 6-2.5-1-6; Sales Tax Information Bulletin 28WC (August 2008).

Taxpayer protests the imposition of sales tax on a "like-kind exchange."

STATEMENT OF FACTS

Taxpayer is an Indiana retail merchant. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not collected and remitted the proper amount of sales tax for the years 2009-2011. The Department also determined that Taxpayer had made purchases on which sales tax was not paid at the time of purchase nor was use tax remitted to the Department. The Department therefore issued proposed assessments for sales and use tax. Taxpayer protests the imposition of sales tax on specific transactions to out-of-state buyers as well as sales tax on an exchange in which a car was traded for a boat. An administrative hearing was held, and this Letter of Findings results. Further facts will be supplied as necessary.

I. Sales Tax—Boat Sales.

DISCUSSION

Taxpayer protests the imposition of sales tax on specific boat sales during the years 2009-2011. Taxpayer states that the boats were delivered out of state and were therefore exempt from Indiana sales tax. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

The Department first refers to IC § 6-2.5-2-1 (a)-(b), which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

The Department next refers to the definition of a retail transaction as stated in IC § 6-2.5-1-2(a):

"Retail transaction" means a transaction of a retail merchant that constitutes selling at retail as described in [IC 6-2.5-4-1](#), that constitutes making a wholesale sale as described in [IC 6-2.5-4-2](#), or that is described in any other section of [IC 6-2.5-4](#).

The Department notes that Taxpayer is a retail merchant as described in IC § 6-2.5-4-1(a)-(b), which states:

- (a) A person is a retail merchant making a retail transaction when he engages in selling at retail.
- (b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:

- (1) acquires tangible personal property for the purpose of resale; and
 - (2) transfers that property to another person for consideration.

The Department additionally notes that Taxpayer is liable for any sales tax that was not collected and remitted as stated in IC § 6-2.5-9-3:

An individual who:

- (1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and
 - (2) has a duty to remit state gross retail or use taxes (as described in [IC 6-2.5-3-2](#)) to the department; holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state. If the individual knowingly fails to collect or remit those taxes to the state, he commits a Class D felony. (Emphasis added).

Taxpayer is a retail merchant involved in a retail transaction and thus is required to collect and remit sales tax on retail transactions unless an exemption applies. Since Taxpayer has failed to collect and remit the proper amount of sales tax, Taxpayer is liable for the uncollected and unremitted sales tax as a retail merchant. Taxpayer protests a portion of the proposed assessments of sales tax on the grounds that the sales were to out-of-state customers. Taxpayer argues the transactions fall under the "Interstate Sales Exemption."

The Department refers to Sales Tax Information Bulletin 28WC (August 2008), 20081001 Ind. Reg. 045080728NRA, which states, in relevant part:

VI. INTERSTATE SALES EXEMPTION

A watercraft sold in "interstate commerce" is not subject to the Indiana sales tax. To qualify as being "sold in interstate commerce," the watercraft must be physically delivered by the selling dealer to a delivery point outside Indiana. The delivery can be by the dealer, or the dealer can hire a third-party carrier. The terms and method of delivery must be indicated on the sales invoice. The dealer must document the terms of delivery and must keep a copy of such terms of delivery to substantiate why sales tax was not collected. (ST-108E is not used to support this exemption.) This exemption does not apply to sales to out-of-state buyers in which the buyer takes physical possession of the watercraft in Indiana, nor is the exemption valid if the buyer, and not the seller, hires a third-party carrier to transport the watercraft outside Indiana. If the buyer hires the carrier, the carrier is acting as an agent for the buyer and thus the buyer takes physical possession within Indiana. Possession taken within the state does not qualify as an interstate sale for sales tax purposes. Please note that other exemptions may still be applicable if the sale does not qualify as an interstate sales exemption.

Taxpayer was able to provide sufficient documentation on specific transactions showing that the boats at issue were delivered outside of the state, were accepted by the purchaser in a state other than Indiana, or had an exemption certificate that was presented by the purchaser.

Pursuant to IC § 6-8.1-5-1(c), for this instance, Taxpayer has met its burden of demonstrating that the following "transactions" are not subject to sales tax:

- 1069 on 5/11/11 in the amount of \$7,425 on page 16.
- 1061 on 5/1/11 in the amount of \$47,000 on page 16.
- 1097 on 10/11/11 in the amount of \$65,737 on page 16.
- 1044 on 2/25/11 in the amount of \$47,400 on page 16.
- 1062 on 5/1/11 in the amount of \$414.67 on page 16.
- 1076 on 6/20/11 in the amount of \$51,575 on page 16.
- 1084 on 8/6/11 in the amount of \$31,000 on page 16.
- 1119 on 3/15/10 in the amount of \$32,700 on page 14.
- 1084 on 5/24/09 in the amount of \$16,000 on page 12.
- 1089 on 6/19/09 in the amount of \$10,500 on page 12.
- January 1, 2009 transaction in the amount of \$37,500 on page 12.

Therefore, Taxpayer's protest, as it pertains to the above listed transactions, to the extent that tax was assessed, is sustained subject to the findings of a supplemental audit. The Department notes that while the delivery documentation provided will be sufficient for this protest, it will not be held sufficient for future audits. Further documentation supporting the out-of-state delivery will be necessary. Since Taxpayer failed to produce documentation that demonstrates that the Department's assessment was incorrect for the remainder of the protested transactions, Taxpayer has failed to meet its burden of proof for the other transactions. Therefore, Taxpayer's protest, as it relates to these other transactions, is denied.

FINDING

Taxpayer's protest to the imposition of sales on the out-of-state transactions is sustained for the specifically listed transactions; however, Taxpayer's protest is denied on the remainder of the protested transactions.

II. Sales Tax--"Like-Kind Exchange."

DISCUSSION

Taxpayer protests the imposition of sales tax on a sale in which a car was exchanged for a boat. Taxpayer states that the sale was a "like-kind exchange" and is therefore exempt from sales tax.

The Department refers to IC § 6-2.5-1-6(a)-(b) which states:

(a) "Like kind exchange" means the reciprocal exchange of personal property between two (2) persons, when:

- (1) the property exchanged is of the same kind or character, regardless of grade or quality; and
- (2) the persons exchanging the property both own the property prior to the exchange.

(b) A "like kind exchange" may be a part of a transaction involving additional consideration other than the exchanged property.

Taxpayer argues that an exchange in which a Porsche was traded for a boat should be considered a "like-kind exchange," Taxpayer states that the items exchanged were "pleasure vehicles" and were therefore eligible under the like-kind exchange exemption.

The Department refers to Sales Tax Information Bulletin 28WC (August 2008) which elaborates on this matter and states:

"**Like-Kind** trade values are deductible in determining the amount subject to sales tax. An exempt trade must be of like-kind. This means only a watercraft may be traded for another watercraft or a trailer may be traded for another trailer. Any other type of trade is merely a payment (consideration) from the buyer, the value of which does not reduce the taxable sales price of the purchase."

....

As the regulation states and the Information Bulletin elaborates, the property must be "of the same kind or character." Thus, a watercraft may only be traded for another watercraft. Therefore, the trading of a car for a watercraft is not eligible for the exemption. As a result, Taxpayer has not met its burden to prove the proposed assessment wrong, as provided by IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest to the imposition of sales tax on the "like-kind exchange" is denied.

SUMMARY

Taxpayer's protest to the imposition of sales tax is sustained in part and denied in part. Taxpayer's protest to the imposition of sales tax on the specifically listed out-of-state transactions is sustained in part as detailed in Issue I. Taxpayer's protest to the imposition of sales tax regarding the "like-kind exchange" is denied, as discussed in Issue II.

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